Date of Hearing: March 16, 1999

ASSEMBLY COMMITTEE ON JUDICIARY
Sheila James Kuehl, Chair
AB 310 (Leach) – As Introduced: February 8, 1999

SUBJECT: ANONYMOUS JURIES IN ALL CRIMINAL TRIALS

KEY ISSUES:

1) SHOULD THE IDENTITY OF JURORS (INCLUDING BUT NOT LIMITED TO THEIR NAMES, ADDRESSES AND TELEPHONE NUMBERS) BE KEPT SECRET IN ALL CRIMINAL TRIALS IN CALIFORNIA?

2) WHAT DEGREE OF JUROR ANONYMITY IS PERMITTED DURING CRIMINAL TRIALS UNDER THE UNITED STATES CONSTITUTION? WOULD THE BLANKET SECRECY POLICY PROPOSED IN THIS BILL, THAT PROVIDES FOR JUROR ANONYMITY IN ALL CRIMINAL TRIALS PRIOR TO THE ENTRY OF A VERDICT, PASS CONSTITUTIONAL MUSTER UNDER THE CURRENT UNITED STATES SUPREME COURT DOCTRINE ENUNCIATED IN PRESS-ENTERPRISE V. RIVERSIDE?

3) CAN THE BILL'S CONSTITUTIONAL INFIRMITY BE CURED BY REQUIRING THAT JUROR INFORMATION BE PROVIDED TO THE COURT, PROSECUTOR AND DEFENSE COUNSEL? OR IS THE BILL'S BLANKET ANONYMITY APPROACH TO ALL CRIMINAL TRIALS FATAL IN LIGHT OF THE PRESS-ENTERPRISE REQUIREMENT THAT THE COURT DETERMINE THE NEED FOR SECRECY ON A CASE-BY-CASE BASIS AND ONLY ALLOW IT WHEN A COMPELLING NEED FOR SECRECY HAS BEEN DEMONSTRATED?

SUMMARY: Seeks to protect the privacy of jurors by creating the ‘‘Jury Identification Protection Act,"' requiring that the identity of jurors in all criminal trials in California be kept secret absent a showing of a compelling need against juror anonymity. Specifically, this bill:

1) Provides for the random selection and identification of trial jurors in all criminal actions by number instead of by name.

2) Requires that the identity of all jurors in criminal trials be kept secret from the moment the *voir dire* (jury selection) process begins, regardless of whether the case is a felony or a misdemeanor, and regardless of the lack of any demonstrated threat to a particular juror's safety or privacy.

3) Prohibits counsel or the court from eliciting personal juror identification information during *voir dire* in a criminal trial, including, but not limited to, the juror's name, home address, home or work telephone number, and the location of the juror's employer or school. Also prohibited are such questions about a juror's spouse or children. Violation of this provision by the court or counsel is punishable as contempt of court.

EXISTING LAW:

1) Recognizes that jury service is a long-standing concomitant of citizenship, and that all qualified persons are required to perform jury service unless excused for undue hardship. Reflecting this obligation, qualified jurors who fail to appear as summoned are subject to compelled attendance or punishment for contempt of court for failure to attend. (Code of Civil Procedure Section 209. All further statutory references are to this code unless otherwise noted.)

2) Generally provides for the selection of trial jurors by name, and provides that qualified jurors' names be made available to the public upon request, *unless the court determines that a compelling interest exists in keeping this information confidential*. (Sections 222 and 237.)

3) Permits a trial court to bar access to juror identity information *in all criminal trials* from the beginning of the trial, as long as a compelling need for such secrecy is demonstrated in a particular case, such as to protect jurors from threats or the possibility of personal harm. (Section 237.)

4) Provides that, in all criminal trials, the identifying information of the jurors must be "sealed" immediately upon the recording of the jury verdict, and access to this personal information may only be obtained by petition following a special hearing. Even if such a disclosure petition is filed, the court shall not order a hearing on the matter if it finds that the motion papers establish a compelling interest against the disclosure of such personal juror information. (Section 237.)

5) Places the burden of demonstrating that juror identification information should be secret, prior to the entry of judgment, *on the party seeking secrecy, not the party seeking openness*. (Press-Enterprise v. Riverside (1984) 464 U.S. 501.)

6) Provides for a presumption of openness in criminal trials that may be rebutted only if an overriding interest exists. The overriding interest must be based on the trial court's specific and articulated findings that secrecy is necessary to meet the overriding interest, that closure is a narrowly tailored action, and that alternatives to such secrecy were explored by the court. (Press-Enterprise, supra.)

FISCAL EFFECT: Unknown

COMMENTS: The laudable objective of this bill is to protect the privacy and emotional well-being of those Californians who willingly dedicate their time and resources to serve on a criminal jury trial, sometimes for long and uncertain duration, for little pay, and with substantial work and family disruption. Indeed, this legislation seeks to preserve what many would conclude to be some of our most basic elements of personal privacy, including our names, addresses, phone numbers, work places and school addresses, as well as those of our spouses and children.

To this end, the bill requires that these and other unspecified personal identifiers of jurors in criminal trials in California automatically be kept secret. It shifts the burden to those who might seek this information, including the attorneys in a given case, as well as the press and the public, to prove that a compelling

need exists for this and other unspecified information to be made public. The approach to juror anonymity is a broad one, in that all such juror identity information shall be kept secret in *all* criminal trials, regardless of the nature of the crime charged, and regardless of whether there is a need for juror anonymity in a particular circumstance.

This issue is not new to the Legislature. It has confounded policy-makers for decades as they have sought to balance the understandable desire to protect juror privacy as much as possible while staying within the constitutional bounds required to provide for the most fair and open trials possible. This bill is the most recent effort in a long line of legislative attempts to require the use of anonymous juries in criminal cases. Unlike several prior bills that did not bar access to juror identity information by a prosecutor and defense counsel, this bill seeks automatically to shield all such information from the attorneys of record as well as from criminal defendants, the press and the public in general.

In support of this more ambitious approach to the scope of juror privacy, the author states:

> One of the many burdens we place on jurors is the intrusion upon their right to privacy by requiring them to disclose personal information. The disclosure of personal information in a criminal trial leads to the possibility of physical retaliation by an angry defendant, on the juror's family. While actual physical altercations following a trial are uncommon, threats and intimidation are prevalent. More importantly most jurors who live in fear commonly lose sleep, and experience other stress-related symptoms. For instance, gang members routinely intimidate jurors during gang member criminal trials, and jurors are justifiably concerned.
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> Assembly Bill 310 would use numbers to identify jurors throughout the criminal proceedings. Unless a defendant can show a compelling need, a juror would not be required to disclose their name, home and work address, their children's names, or schools, or spouse's work address. The use of i.d. numbers would alleviate this fear, thus making a juror more comfortable and encourage honest answers to personal, and often embarrassing, questions during *voir dire*. An anonymous jury would also allow jurors to focus their complete attention on the proceedings during the trial and deliberations and not be distracted by fear for their family's safety. Los Angeles County, which contains one-third of all courts statewide, successfully uses anonymous juries in all of its criminal trials. Since juries are instructed of the uniform and routine use of jury anonymity, the defendant maintains his presumption of innocence.

In further support of the bill, the author states that "[i]n 1994, Los Cerritos Municipal Court allowed each juror to decide whether they wanted to be referred to by name or number and in over 2,800 jurors only 6 did not request an i.d. number. This program had a 99.75% participation rate and has proven to be popular with jurors. Additionally, defendant's continue to receive a fair trial by an impartial jury. Each attorney can still question each [juror] about any and all relevant background information and some judges have found jurors more up front and honest when they are being identified with numbers. . . .Assembly Bill 310 will help create a sense of security, encourage jury service, and thereby create a more representative jury panel."

The author also has shared correspondence with the Committee from one of her constituents (who is the sponsor of the bill), describing a disturbing experience the constituent had while serving on a jury in a criminal trial in Martinez, California. According to the author's office, this constituent will testify at the Committee hearing on this bill that it is improper, and completely unnecessary, for a criminal defendant to learn the names of jurors during *voir dire* and the trial; and that sealing this information only after a verdict is entered (as required under current law) is futile, since the damage to juror privacy and security has already been done.

This bill thus raises challenging policy and constitutional issues as policy-makers reasonably seek to encourage people to willingly serve on juries free from fear, while ensuring that those charged with crimes receive the open and fair trials required by the Constitution. There can be little doubt that there are circumstances, perhaps increasing, when protecting juror secrecy and privacy will be found to be paramount. The fundamental questions before the Committee are whether there is sufficient evidence to support enactment of a blanket policy requiring juror anonymity in all criminal cases – and whether such a state law would survive the "strict scrutiny" the United States Supreme Court has opined is required.

Historical Backdrop: According to the United States Supreme Court, the presumptive openness of jury selection dates back to at least the 1500's in England, and was common practice in America at the time the Constitution was adopted. (Press-Enterprise v. Riverside, supra, 464 U.S. 501.) Allowing the public to observe the selection of jurors has historically been believed to provide the public needed confidence that the criminal justice system is fair and unbiased. In the *voir dire* process, the court and the attorneys involved in criminal cases have historically questioned prospective jurors to try to ensure a fair and impartial jury. Personal views have traditionally been elicited from the jurors to determine whether they have the ability to be fair and impartial in the case before them. Both prosecutors and defense attorneys have consistently argued in the Legislature over the years that access to such personal information about jurors is absolutely necessary to determine whether prospective jurors hold a potential bias. Indeed, the U.S. Court of Appeals for the Fourth Circuit, relying on Press-Enterprise, rejected jury anonymity in In re Baltimore Sun (4th Cir. 1988) 841 F.2d 74, stating forcefully:

> We think it no more than application of what has always been the law to require a . . . court . . . to [make public] the names and addresses of those jurors who are sitting. . . .[W]e recognize the difficulties which may exist in highly publicized trials . . . and the pressure upon jurors. But we think the risk of loss of confidence in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity. If . . . the attendant danger[s] of a highly publicized trial are too great, [the court] may always sequester the jury and change of venue is always possible. . . .
> (841 F.2d at 76-77.)

Thus, in most courts across the country today, there is still no strict policy such as that contained in this bill requiring that all criminal juries remain anonymous from the start of the jury selection process, whether the case is a felony or a misdemeanor, and regardless of the lack of any demonstrated threat to a particular juror's safety or privacy. However the use of anonymous juries on a case-by-case basis is reported to be increasing, as seen by their use in the widely publicized trial of those accused of the fatal World Trade Center bombing in New York City. In addition, a few courts in California, notably a couple in

Los Angeles County, have imposed anonymity procedures in a few pilot criminal trials (though, according to local officials, even these attempts at experimentation have been challenged by the Los Angeles Public Defender as unconstitutional). (See also "Anonymous Juries Gain Ground," Los Angeles Daily Journal, January 8, 1998, stating that the use of anonymous juries in criminal trials in Los Angeles County has been continuously sought by Judge Philip Mautino of the Los Cerritos court, whom the author states will be in attendance at the Committee hearing to testify in support of this legislation.)

Statutory Backdrop: In California, like most states across the country, the selection of trial jurors has traditionally been by name, and Code of Civil Procedure Section 222 continues to provide that qualified jurors' names are generally to be made available to the public upon request. In 1995, however, the Legislature passed, and the Governor signed, SB 508 (Campbell), 1995 Stats. Ch. 964, to address legislators' growing desires to protect juror privacy in criminal trials. Pursuant to SB 508, as of January 1, 1996, all juror information in a criminal trial in California is now automatically *sealed* as soon as the jury verdict is recorded. Any person may petition the court for access to juror information. However, *only if good cause for that information is shown* on the face of the court pleadings will a hearing on the release of that information even be scheduled. Otherwise, the court will bar the release of such personal information. (Code of Civil Procedure Section 237(b).)

Since the enactment of SB 508, bills have been repeatedly introduced in the Legislature to "move up" the secrecy shield on juror identity information from the time of the verdict to the beginning of the *voir dire* process in all criminal trials. However, all of the earlier legislative proposals calling for automatic juror anonymity *during voir dire* have been found by the Legislature's committee analysts to be constitutionally unsound, and no such proposals seeking automatic *voir dire* anonymity have thus far been successful.

Federal Caselaw: Several federal courts, and most importantly the United States Supreme Court, have weighed in on the question of whether, and in what manner, states may limit access to juror identification information during the pre-verdict period. (This issue has yet to come before the Ninth Circuit Court of Appeal.) In 1984, the United States Supreme Court considered this issue in the Press-Enterprise case noted above. The Court held that there are indeed clear constitutional constraints limiting the degree to which access to juror information can be barred during a criminal trial.

In that case, the Press-Enterprise newspaper moved to have the *voir dire* examination of prospective jurors in a gruesome murder case opened to the press. The State of California opposed the newspaper's motion, asserting that the jurors in this trial would not be candid with their answers if the press were present during juror questioning. The trial judge agreed and prohibited the press from attending the individual *voir dire* proceedings. The *voir dire* lasted six weeks, and all but three days of it were closed to the public. When the press tried to get copies of the transcript of the *voir dire,* the trial judge denied the motion on the grounds that although most of the answers by the jurors were routine, there were some questions and answers that were of a personal nature, and release of the information would violate the privacy rights of the jurors. (Press-Enterprise, supra at 507.)

The Supreme Court rejected the trial court decision, finding that, based on long historical precedent, trials, *including voir dire proceedings*, are inherently public proceedings. The Court reasoned that a defendant is entitled to a fair and open trial under the First and Sixth Amendments. It found that openness in trials enhances both the basic fairness of the criminal trial and the appearance of fairness to

the general public, thereby giving the public confidence in the jury system. (Id. at 508.) The Court cited Globe Newspaper Co. v. Superior Court, (1982) 457 U.S. 596, for the important proposition that:

> Closed proceedings, although not absolutely precluded, must be rare *and only for cause shown that outweighs the value of openness*. (Press-Enterprise, supra, at 509.) (emphasis added.)

The Court found that a state's justification for closure of a public criminal proceeding must be a "weighty one." (Id.) Perhaps most importantly in the legal analysis of this legislation, the Court further held that trials may be held in secret only if the trial court determines *on a case-by-case basis* that the presumption of openness is overcome by an overriding interest (e.g., the defendant's right to a fair trial). The Court required that the overriding interest be based on the trial court's *specific and articulated findings* that secrecy is essential to meet the overriding interest, that the secrecy is narrowly tailored to meet the interest, and that alternatives to secrecy have been clearly considered. In rejecting the trial court's order of secrecy in Press-Enterprise, the Supreme Court emphasized that, in that case, the trial court did not articulate specific findings as to why it needed to close *voir dire*; nor did it consider alternatives to closing it. (Id. at 513.)

Press-Enterprise, and the precedents on which this United States Supreme Court case was based, therefore establishes that, in order to deny access to juror information in a criminal proceeding, a trial court must go through the overriding interest analysis in every case in which the court is considering closure. The burden to demonstrate the need for juror secrecy is on those seeking secrecy, not on those seeking openness. And the court ordering juror secrecy during the trial must articulate specific findings as to why such anonymity is needed, and whether it considered alternatives to such secrecy.

In a brief filed in the recent Unabomber case, counsel for the press noted that the United States Supreme Court has held that the press and public may not be excluded from voir dire, except in unusual, carefully circumscribed cases, and then only to the extent necessary to protect a value higher than the public's First Amendment right of access to criminal trials. (Appellate Brief in *Unabomber Trial Media Coalition v. United States District Court*, citing Press-Enterprise, on file in the Assembly Judiciary Committee.) Cautioning that the Court had not found a "right to privacy of prospective jurors" they pointed out that Justice Blackmun suggested that jurors, despite the fact that they do not put themselves voluntarily in the public eye, have no reasonable expectation of privacy as to what they say in court. (Press-Enterprise, supra at 514, n.1) (Blackmun, J., concurring).

Bill's Likely Unconstitutionality Under Press-Enterprise: As described above, it therefore appears highly likely that the strict juror anonymity approach contained in this bill is *unconstitutiona*l under the United States Supreme Court's decision in Press-Enterprise for the following briefly summarized reasons.

1) This bill improperly requires courts to bar access to juror identification information in all criminal cases without the specific showings required under Press-Enterprise. For such a bill to pass muster in this area, any such governmental action imposing secrecy must be determined on a *case-by-case basis*, with evidence in the record the court articulated specific findings supporting the need for broad juror anonymity and considered the possibility of less restrictive alternatives. Thus even amending the bill to

permit counsel to receive juror identity information would not cure the bill's fundamental constitutional failing that it removes a case-by-case judicial determination of the need for juror secrecy.

2) This bill stands the historical presumption of openness of criminal trials stated by the United States Supreme Court in Press-Enterprise and the cases that followed on its head, in essence creating a new presumption *favoring* juror secrecy in criminal trials in California. Under this bill, an unclear range of personal juror information automatically would be shielded. Furthermore, a shifting of the presumption brings about a shifting of the burden of proof as well. Under existing Code of Civil Procedure Section 237, the party wishing to bar access to juror identification information *during a criminal trial* still must prove a compelling reason to seal the information. Under this bill, the party wishing to *gain access* to such information would be required to show a compelling need for openness; otherwise, the information automatically remains secret. According to Gerald Uelmen, Dean of Santa Clara University School of Law:

> [S]hifting the burden, to those who object to anonymity, to show some compelling reason to justify release of juror's names and addresses would be unconstitutional. The burden [must] remain on those seeking anonymity, to show the unusual circumstances that might justify it (e.g. threats to jurors, media irresponsibility, etc.). (Correspondence on file with Assembly Judiciary Committee.)

3) The bill also appears fatally flawed under the Constitution's due process requirements due to its inadequate precision about precisely what actions might lead to the punishment of a judge or attorney for contempt. It is not clear precisely which types of juror identity information is covered in the bill at page 2, lines 20-21 by the phrase "personal juror identification information". Could this term include such information as a juror's occupation, military service, or criminal record? In addition, the phrase "including, but not limited to" in reference to such "personal juror identification information" appears so ambiguous as to inadequately warn a judge or attorney about limits on information that may be properly asked of a prospective juror during voir dire, at penalty of contempt.

Request for Review from the Assembly Public Safety Committee: In the event this legislation is approved by the Committee, the Assembly Public Safety Committee has requested that the bill be re-referred to it for an additional hearing.

ARGUMENTS IN SUPPORT:

As noted above, the bill's principal sponsor is a constituent of the author's who had a disturbing personal experience as a juror in a criminal case, who writes in support of this measure:

"I was on jury duty on a criminal case the whole month of October and want to express my concerns and experiences encountered during and after the trial. . . .Let me explain what happened. It took several days and 250 people to impanel the jury. Since I had never done this before and figured I wouldn't be picked, I was not paying a whole lot of attention the first three days. I thought the people sitting at the counsel table were only attorneys because they were using our names so freely. I also thought that when the selection process had narrowed the potential jury candidates to about 45 people, the

defendant would be brought in to help select the jury and at that time we would be assigned to a number. I had no idea that the defendant was present the whole time from day one. . . .

I felt that the use of jurors' names in either the selection process or the actual trial could put any juror in a potentially dangerous situation. The judge assured me that when the jury was selected the records with our names would be sealed. I explained that by that time it is too late as the attorneys already had access to the information still believing that the defendant wasn't present. In retrospect, not only did the attorneys have the information, but also the defendant who was present and taking notes had the information. . . .

[When] I found out the defendant had been present from the beginning and was a party to my discussions concerning privacy and security issues with the use of jurors' names . . . we again went into [the judge's] chambers with the attorneys and the defendant. I was told that the defendant had the right to know -everything that was said. He also said that by law the defendant has the right to know the names, sex and nationality of his jury since he is innocent until proven guilty. . . .

Whether a juror is called John Smith or juror number 235, neither the prosecution nor the defense is prevented from obtaining the information necessary to insure that the jurors selected would be fair and impartial. There was absolutely no reason he needed to know our names unless he wanted to intimidate us. Every time our names were given, he would write it down. In fact as each of us were called to sit in the jury box he would write the name down and then look at us. . . .

I have no problem with the defendant knowing information about me that would be relevant to my suitability for jury duty, but questions that would allow the defendant to find me should not be permitted. I don't know if the death threat and the heavy breathing phone calls that I have received have anything to do with the trial, but I never received them before. They came after he was sentenced to 48 years.

Citizens may not be as reluctant to serve jury duty if they felt that they were not unnecessarily endangering their own personal safety. As it is today any unusual phone calls or unexplained property damage causes the juror to suspect the act was the result of serving on the jury which has a chilling affect on the juror, his or her family and friends about serving on future juries."

ARGUMENTS IN OPPOSITION:

Many organizations wrote the Committee in strong opposition to the bill, and they are listed below. A few of the more compelling opposition statements are recounted here.

The California Judges Association writes in strong opposition to the bill, stating that its opposition is based upon several factors, including:

"CJA traditionally has supported the principal of openness in court proceedings to the maximum extent possible. Counsel, the press, and ultimately the public have an interest in as much information as possible about the court system and its participants, and this "presumption" in favor of open proceedings should be disturbed only upon a compelling need. . . .The entire process of assigning numbers to

prospective jurors and working to avoid the disclosure of identifying information constitutes an administrative burden unnecessary in the vast majority of routine criminal matters."

The Society of Professional Journalists, Northern California Chapter, also writes in opposition to the legislation that:

"Our constitution demands that our criminal justice systems strike the right balance between an accused's right to fundamental fairness, a juror's right to personal privacy, and the public's right to know that offenders will be brought to account for their criminal conduct. AB 310, if enacted, will upset the required constitutional balance, in at least three respects.

First AB 310 offends the Sixth Amendment guarantee that a defendant shall enjoy 'the right to a speedy and public trial, by an impartial jury of the State.' It also severely weakens the State's ability to prosecute crime. If enacted, AB 310 will close off all inquiry into prospective jurors' personal identities – whether by defense counsel, the district attorney, or the court – even in cases where the inquiry would in fact reveal bias. . . .

Second, AB 310 unnecessarily complicates the lives of judges attempting to conduct *voir dire* proceedings. To meet the constitutional demands of fairness, judges must be free to route out the potential for juror bias in every case. As the United States Supreme Court has observed, this can only be accomplished by an open selection process that permits inquiry into all areas of juror identity, and properly vests *with the court* the discretion to protect, on a case by case basis, deeply personal matters that a person has legitimate reason for keeping out of the public domain. [Citation omitted.]

Third, and most importantly, if enacted, AB 310 will undermine the public's confidence in the State's criminal justice system. . . .The First Amendment establishes a public right of access to juror information, *including* identity information, so that the public may be assured that standards of fairness are being observed in every case. [Citation omitted.] AB 310 offends this constitutional standard."

The First Amendment Coalition writes, among other concerns, that "[a]n anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence. The presumption of innocence is 'undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" [Citation omitted.]

The California Defense Council writes that "[i]n both the civil and criminal arenas, the ability to provide an effective defense often turns on a jury composed of a true cross-section of the community. Enacting sweeping limitations on information available and punishing the elicitation in prohibited categories with contempt, will ultimately chill the effective representation of clients and threaten the openness of our judicial system."

California Attorneys for Criminal Justice states that the actual number of jurors who have been annoyed, harassed, or injured by the press or by criminal defendants, or by the friends of defendants is so small that it is not reasonable to make the entire jury selection process confidential. Such a step would only inject paranoia into the system. Additionally, "[a]nonymous juries . . . create a perception among jurors

that there is a reason for anonymity -- sending the message . . . that the defendant poses some kind of a threat. This creates a presumption of dangerousness, nullifying the presumption of the defendant's innocence."

PRIOR LEGISLATION:

A litany of bills have been rejected in the last three legislative sessions which would have authorized referring to jurors merely by numbers rather than their names:

1995 SB 1199 (Mountjoy) Failed.
1995 SB 508 (Campbell) (Ch. 964) Created current Code of Civil Procedure section 237.
1996 AB 2922 (Hawkins) Failed.
1997 SB 14 (Calderon) Juror anonymity portions deleted.
1997-1998 session, AB 886 (Morrow) Died.

REGISTERED SUPPORT / OPPOSITION:

Support

Georgie Monighetti (Sponsor)
Presiding Judge of the Los Cerritos Municipal Court, Philip Mautino
Gary Cramer, Certified Shorthand Reporter
Other interested individuals

Opposition

California District Attorneys Association
California Judges Association
American Civil Liberties Union
First Amendment Coalition
CA Defense Counsel
California Newspaper Publishers Association
California Attorneys for Criminal Justice
California Public Defenders Association
Los Angeles Public Defender

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